No. 89-1836

In the Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

JOEL R. MARCUS
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, which restricts extrajudicial attorney statements concerning pending litigation, violates the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulation, and rules:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the constitutionality of an ethical rule that restricts an attorney's public comments about pending litigation in which he is involved. The United States has an interest in ensuring that criminal trials are free from the taint of prejudicial comments by the attorneys involved, and therefore has an interest in the constitutionality of ethical rules such as the one at issue in this case.

STATEMENT

1. Petitioner, a criminal defense attorney in Las Vegas, Nevada, represented a client indicted on state charges of grand larceny, drug trafficking, and racketeering. In response to adverse publicity about his

client, petitioner held a press conference, attended by the electronic and print media, the day after his client was indicted. At the press conference, petitioner vouched for his client's innocence;[1] said that his client was a "scapegoat," Pet. App. 8a; attacked the credibility of potential prosecution witnesses, calling them drug dealers and money launderers;[2] and accused a police detective, who he knew would be a prosecution witness, of being a drug abuser and the likely perpetrator of the crime.[3]

The trial of petitioner's client took place approximately six months later. Petitioner's client was acquitted on all charges.

2. On December 6, 1988, the State Bar of Nevada filed a one-count complaint against petitioner alleging a violation of Nevada Supreme Court Rule 177. R. 8-9. That provision is identical to ABA Model Rule of Professional Conduct 3.6, and regulates an

---

[1] Petitioner stated (Pet. App. 12a):

> I know I represent an innocent man, Allen.
>
> The last time I had a conference with you, was with a client and I let him talk to you and I told you that the case would be dismissed and it was. Okay?
>
> I don't take cheap shots like this. I represent an innocent guy. All right?

[2] Petitioner stated (Pet. App. 8a):

> Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers.

[3] Petitioner stated (Pet. App. 8a):

> There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

attorney's extrajudicial statements on pending litigation. Rule 177 is divided into three sections. Section 1 provides that an attorney shall not make comments he knows or reasonably should know will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Section 2 advises the attorney that a comment "ordinarily is likely" to have that effect when it relates to, *inter alia*, the credibility of potential witnesses and the attorney's opinion as to the guilt or innocence of the accused. Section 3 says that certain statements are permissible even if they "ordinarily [are] likely" to materially prejudice an adjudicative proceeding or have a "substantial likelihood" of so doing.[4]

---

[4] Rule 177 provides:

> 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to * * * a criminal matter * * * and the statement relates to:
>
> (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness * * *.
>
> * * * * *
>
> (d) any opinion as to the guilt or innocence of a defendant * * * in a criminal case * * *;
>
> * * * * *
>
> 3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
>
> (a) the general nature of the claim or defense;
>
> * * * * *
>
> (c) that an investigation of the matter is in progress, including the general scope of the investigation,

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar of Nevada found that petitioner had violated Rule 177 and recommended that he be privately reprimanded. The Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. R. 18. It also found that petitioner believed others whom petitioner characterized as money launderers and drug dealers would be called as prosecution witnesses. *Ibid.* In light of the contents, the setting, and the timing of petitioner's statements to the media, the Board concluded that petitioner knew or should have known that those statements would have a "substantial likelihood of materially prejudicing" the fairness of his client's trial. R. 20.

3. Petitioner appealed to the Nevada Supreme Court, which affirmed the Board's decision. Pet. App. 2a-5a. The court found by "[c]lear and convincing evidence" that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* at 3a. The court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments improperly "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses." *Id.* at 4a. Although the

---

the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved * * *.

court found that the comments caused "no actual prejudice in this case," it concluded that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.* The court rejected petitioner's contentions that his comments were permitted by Section 3 of Rule 177, and that the Rule violated his right to free speech under the federal and Nevada constitutions. Pet. App. 4a.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.). For that reason, this Court has condemned "trial by newspaper," see *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Bridges* v. *California*, 314 U.S. 252, 271 (1941), and has called for "steps * * * that will protect [court] processes from prejudicial outside interferences. * * * Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Sheppard*, 384 U.S. at 363. In accordance with that suggestion, the American Bar Association and a number of state bars have adopted disciplinary rules designed to restrict statements to the press by attorneys involved in pending cases.[5] Those rules are not unconstitutional.

---

[5] Disciplinary Rule 7-107 of the ABA's Model Code of Professional Responsibility, which contained a prohibition against extrajudicial commentary about pending cases, was adopted

1. The right of ordinary citizens to publish lawfully obtained information relating to a pending proceeding may be curtailed only if publication of the information presents a "clear and present danger" to the fairness of a defendant's trial. See, *e.g.*, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 101-106 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837-845 (1978); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310-312 (1977); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 556-570 (1976); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487-497 (1975). Different considerations apply, however, when it is a lawyer in the case who is the source of the information.

The lawyer stands on different First Amendment ground than a layman or a reporter. "[L]awyers must operate * * * as assistants to the court in search of a just solution to disputes." *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) (lawyers' services "are essential to the primary governmental function of administering justice"); *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) ("[A] lawyer actively participating in a trial * * * is not merely a person and not even merely a lawyer, * * * [but] an intimate and trusted and essential part of the machinery of justice."). A lawyer's license to practice law necessarily carries with it obligations to the system of justice—as an "officer of the court"—that are not shared by his

---

in 1968. In 1983, the ABA promulgated the Model Rules of Professional Conduct; Rule 3.6 of that Code governs extrajudicial attorney commentary. That Rule has been adopted by Nevada and 17 other States without change, and by 7 other States with revisions.

client or by a reporter. One of those obligations is to refrain from making prejudicial public comments about a pending trial. Because of the special duty of lawyers to ensure the fairness of judicial proceedings, the First Amendment permits restrictions on a lawyer's right to comment about a case in which he is participating, when the lawyer's comments are reasonably likely to jeopardize the fairness of the trial.

Under that standard, the restraint on speech imposed by Rule 177 is consistent with the First Amendment rights of attorneys. The Rule applies only when there is a substantial likelihood that the speech in question will materially prejudice the trial. Moreover, the restraint on speech is limited: it applies only to speech that can be expected to have a prejudicial effect; it is neutral as to points of view; and it is limited to postponing the attorney's comments until after the trial. In the meantime, the client, counseled by his lawyer, can speak himself or can retain a spokesman to speak on his behalf; the restraint imposed by Rule 177 applies only to comments by the lawyer himself.

2. Rule 177 is neither vague nor overbroad. The Rule sets forth, in terms that are as specific as the limits of language allow, the rule governing attorney comments on a pending case (Section 1), the kinds of statements that are likely to violate the Rule (Section 2), and the kinds of statements that are permissible (Section 3). If a proposed statement falls close to the line of propriety, there is no reason why the attorney may not seek guidance from the bar association as to whether the statement is permissible. Moreover, the Rule does not subject attorneys to strict liability. A comment on a pending case is sanctionable only if the attorney knows or ought to

know that it is improper. Under these circumstances, attorneys who have familiarized themselves with the ethical rules are likely to have a reasonably clear idea of the kinds of statements that are forbidden, and attorneys are not likely to avoid permissible statements out of fear that those statements will be found to fall within the Rule's prohibitions.

ARGUMENT

I. THE FIRST AMENDMENT PERMITS A STATE TO DISCIPLINE AN ATTORNEY WHO MAKES PUBLIC COMMENTS THAT ARE LIKELY TO PREJUDICE A TRIAL

A. Lawyers Have Historically Been Required To Refrain From Engaging In "Trial By Newspaper"

From the dawn of the legal profession, lawyers have been recognized to be "officers of the court" who owe allegiance to the system in which they play an integral part. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1867) ("Attorneys * * * are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature."); *Ex parte Cole*, 6 F. Cas. 35 (C.C.D. Iowa 1879) (No. 2,973) (attorney is officer of court over whom court "possess[es] an inherent power to control"); *People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465, 470, 162 N.E. 487, 489 (1928) (Cardozo, J.) (a lawyer is "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice"); 4 W. Blackstone, *Commentaries on the Laws of England* 26 (Tucker ed. 1803, 1969 reprint) (attorneys "are in all points officers of the * * * courts * * * and as they have many privileges

on account of their [position], so they are peculiarly subject to the censure * * * of the judges").[6]

For more than a century the legal profession has recognized that lawyers' obligations to the court and to the system of justice justify restricting their extrajudicial commentary about pending cases. The first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to "Avoid Newspaper Discussion of Legal Matters," and stated that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation * * * tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." H. Drinker, *Legal Ethics* 23, 356 (1953). That provision was quickly adopted by 10 other States, and became the basis for Canon 20 of the American Bar Association's Canons of Ethics, promulgated in 1908.[7] See 31 Report of the Ameri-

---

[6] *Cammer* v. *United States*, 350 U.S. 399 (1956), is not to the contrary. That case held that lawyers are not "officers" of a court for purposes of the federal contempt statute, 18 U.S.C. 401(2), which authorizes a court to punish "its officers" for misbehavior "in their official transactions." The term "officers" in that statute was construed to refer only to court officials, and not to include "officers of the court" such as attorneys, who are not employed by the court but have ethical duties with respect to court functions.

[7] Canon 20 stated:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should

can Bar Ass'n 696-697 (1907). By 1914, 31 state bar associations had adopted the ABA Canons. H. Drinker, *supra*, at 25. Thus, from the time the organized legal profession began to police its own ethics, the type of behavior in which petitioner engaged was widely regarded as a proper subject of prohibition.

B. A Lawyer's License To Practice Law Carries With It Reasonable Restrictions Related To Serving The System Of Justice, Including Restrictions On Speech Reasonably Likely To Jeopardize A Fair Trial

Lawyers are licensed by States to play important roles in the administration of justice. In granting a license to practice law, States typically impose restrictions on the lawyer's conduct relating to the exercise of the functions the State has licensed him to perform. Where those restrictions are reasonably related to the proper performance of the lawyer's licensed functions, they are not unconstitutional infringements on the lawyer's personal freedoms. The State "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses, * * * [and] * * * traditionally ha[s] exercised extensive control over the professional conduct of attorneys." *Middlesex Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982). That control is vital not only to ensure fair trials, but also to preserve public confidence in the workings of the justice system, "part of the very foundation of

not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

our constitutional democracy." *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965).

The restriction on extrajudicial comments regarding pending litigation is a reasonable condition on the State's extension of the privilege of practicing law. Courts have recognized that "restricting the extrajudicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process." *In re Hinds*, 90 N.J. 604, 615, 449 A.2d 483, 489 (1982). As the court stated in *Chicago Council of Lawyers* v *Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), "public justice is no less important than an accused's right to a fair trial." See *Hirschkop* v. *Snead*, 594 F.2d 356, 366 (4th Cir. 1979) (en banc).

Although a newspaper is ordinarily free to publish any information it lawfully obtains about a pending judicial proceeding, the cases enunciating that rule have all addressed the relationship between the judicial system and outsiders to that system.[8] With

[8] See *Bridges* v. *California*, 314 U.S. 252 (1941) (contempt charge against newspaper for criticism of court's handling of case); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946) (same); *Craig* v. *Harney*, 331 U.S. 367 (1947) (same); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (newspaper convicted for publishing name of judge under ethics investigation); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) (press has right to report rape victim's name); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (press has right to publish information learned at criminal trial); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (press has right of access to criminal trials); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982) (press has right of access to testimony of minor victims of sexual of-

respect to inside information, the press has no right of access to speech that an attorney is unwilling or unauthorized to share. See *Landmark Communications*, 435 U.S. at 845 (holding that newspaper could publish lawfully obtained, albeit secret, information, but recommending "careful internal procedures" to prevent disclosure of such information in the future); *Sheppard*, 384 U.S. at 363 (courts have obligation to "prevent prejudice at its inception"). Nor does the attorney's client have the right to require his attorney to speak or otherwise represent him in ways forbidden by the code of ethics. See *Nix* v. *Whiteside*, 475 U.S. 157, 174-175 (1986). Because of the lawyer's special status as a licensed officer of the court, the rules that allow a lawyer's client or the press to comment publicly on a pending trial do not authorize the lawyer to speak for his client in the same manner.

Restrictions on an attorney's extrajudicial comments are proper even in the absence of a "clear and present danger" to the fairness of an adjudicatory

---

fenses); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) (press has right of access to jury selection); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (press has right of access to suppression hearings); *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (press has right of access to preliminary hearings).

The only case that even arguably involved a non-third-party was *Wood* v. *Georgia*, 370 U.S. 375 (1962), where a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an "officer of the court" by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. *Id.* at 393. The same cannot be said about petitioner, whose statement was made in the course of and in furtherance of his role as defense counsel.

proceeding in which the attorney is involved. The argument that a lawyer is just like any other member of the public ignores the special impact that a lawyer's extrajudicial comments about a case are likely to have. The lawyer's special role in the case—which he enjoys because of his state-conferred license—make him more likely to be believed. By the same token, it is the attorney's special status that can make his inflammatory remarks especially inimical to the fairness of the judicial proceedings on which he is commenting.[9]

---

[9] A lawyer's extrajudicial commentary on a pending proceeding is on especially weak First Amendment ground when the information he seeks to disseminate was gained through his role as a lawyer. For example, *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), held that a newspaper could be prevented from publishing information that it had obtained through pretrial discovery. The newspaper's special access to information led the Court to conclude that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34.

Snepp v. *United States*, 444 U.S. 507 (1980), also suggests that special access to information may constitutionally carry with it a limitation on the right to disseminate that information. *Id.* at 509 n.3. Upon joining the Central Intelligence Agency, Snepp promised "not to publish *any* information relating to the Agency without submitting the information for clearance." *Id.* at 511 (emphasis in original). When Snepp violated that obligation, this Court enforced it even though Snepp's book divulged no classified information. The Court reasoned that Snepp could be held to "reasonable restrictions" on the dissemination of information potentially undermining the Agency's activities. *Id.* at 509 n.3, 511. An attorney's status as a member of the bar imposes an analogous ethical duty on him in handling information that comes to him because of his special status, such as information gained in

This Court has recognized the crucial difference between attorney and non-attorney speech. In *In re Sawyer*, 360 U.S. 622 (1959), a lawyer who was actively involved in a pending criminal case was disciplined for making a speech condemning the prosecution of her client. A majority of the Members of this Court agreed that ethical precepts can require attorneys to abstain from what would otherwise be constitutionally protected speech. *Id.* at 646 (Stewart, J., concurring) ("A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."); *id.* at 668 (Frankfurter, J., dissenting) ("[A] lawyer actively participating in a trial * * * is not merely a person and not even merely a lawyer. * * * Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspapers.") (quoting *Bridges* v. *California*, 314 U.S. 252, 271 (1941)). State regulation of an attorney's comments implicating the fairness of his client's trial is also consistent with this Court's repeated recognition of trial judges' broad latitude to restrain lawyers' statements regarding trials over which they preside:

> [O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 563 (1976); *id.*, at 601 and n. 27 (Brennan, J., concurring in judgment); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310-311 (1977); *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 104, n. 21 (1981).

Seattle Times Co. v. *Rhinehart*, 467 U.S. at 33 n.18.

We submit that the proper balance between a lawyer's duty to the justice system and his right to speak freely is struck at the point where there is a reasonable likelihood that his statements will prejudice a pending proceeding in which he is involved. Most courts that have addressed the issue have struck the balance at that point. See, *e.g.*, *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Hughes* v. *State*, 437 A.2d 559 (Del. 1981); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *Widoff* v. *Disciplinary Board*, 54 Pa. Commw. 124, 420 A.2d 41 (1980), aff'd, 494 Pa. 129, 430 A.2d 1151 (1981), appeal dismissed, 455 U.S. 914 (1982); *Zimmerman* v. *Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), cert. denied, 490 U.S. 1107 (1989); *In re Disciplinary Proceeding Against Eisenberg*, 423 N.W.2d 867 (Wis. 1988); cf. *United States* v. *Tijerina*, 412 F.2d 661, 667 (10th Cir.) (applying "reasonable likelihood" test in reviewing trial court "gag" order), cert. denied, 396 U.S. 990 (1969); *Younger* v. *Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (same); *People* v. *Dupree*,

---

plea bargaining, or criminal discovery material. See *Butterworth* v. *Smith*, 110 S. Ct. 1376, 1383 (1990) (Scalia, J., concurring) (no First Amendment problem with restriction on newspaper reporter's disclosure of grand jury proceedings at which the reporter has testified, because reporter acquired knowledge not "on his own" but "only by virtue of being made a witness").

88 Misc. 2d 780, 388 N.Y.S.2d 203 (1976) (same)." The Department of Justice has also determined that a "reasonable likelihood" of prejudice is the appropriate standard for restricting its own lawyers' commentary. See 28 C.F.R. 50.2(b)(2). Although a lawyer must be a zealous and partisan advocate for his client, he must litigate his cases in courts of law, not in the court of public opinion.

The restraint on extrajudicial commentary is not the only restriction on lawyer speech that the ethical rules impose. Other restrictions serve equally important purposes, and the justice system would be seriously impaired if those restrictions were found to offend the First Amendment. For example, ethical rules forbid a lawyer from disclosing confidential information related to him by his client unless the client consents after consultation. See ABA Model Rule of Professional Conduct 1.6. Under the analysis proposed by petitioner and his *amici*, however, the rule protecting client confidences would appear to violate the First Amendment. Clients often divulge information to their lawyers that relates to matters of public interest. If petitioner's constitu-

[10] A few courts have chosen other balancing points. See *Markfield* v. *Association of the Bar*, 49 A.D.2d 516, 370 N.Y.S.2d 82 ("clear and present danger" test), appeal dismissed, 337 N.E.2d 612 (N.Y. 1975); *United States* v. *Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) ("serious and imminent threat" test). The Seventh Circuit has applied a "serious and imminent threat" standard to review both disciplinary rules, see *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d at 249; *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971), and trial court gag orders, see *Chase* v. *Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); see also *Levine* v. *United States Dist. Court for the Central Dist. of California*, 764 F.2d 590, 596-598 (9th Cir. 1985) (applying "serious and imminent threat" test in reviewing trial court "gag" order).

tional analysis is correct, a lawyer would apparently have a First Amendment defense to the imposition of sanctions for revealing those confidences to the press or the public.

There is plainly no constitutional flaw in the rule barring disclosure of such confidences. The proper functioning of the legal process mandates that a lawyer bear the burden of not disclosing client confidences as a condition of being a lawyer.[11] To argue that the lawyer may not reveal confidences because of his duty to represent his client begs the question. The lawyer has that duty because of the ethical canons and the nature of his role as a lawyer. Those are the same sources of authority that justify restrictions on other aspects of the lawyer's conduct, such as making extrajudicial comments on pending cases.

The lawyer's license to practice carries with it other First Amendment burdens as well. His freedom of speech and association are limited by a prohibition on direct communication with persons represented by counsel, ABA Model Rule 4.2, and by the duty of candor to the court, ABA Model Rule 3.3, which requires the lawyer to speak even if he would prefer to remain silent and even if speaking would adversely affect his client.[12] And the lawyer's free-

[11] The same reasoning would apply to the lawyer who wants to tell the press that his client is guilty. In many cases that would be information of the highest public concern, yet it is absurd to think that the lawyer's First Amendment rights give him the liberty to make such a statement.

[12] This constraint is illustrated in *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429 (1988). In that case, appellate counsel for an indigent defendant believed his client's arguments on appeal were frivolous. He therefore prepared a brief that advanced several arguments for reversal but

dom of association is further limited by his duty to represent indigent defendants when he is appointed to do so. See *Barnard* v. *Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 287 (1985); H. Drinker, *supra*, at 62 (lawyers have had duty to represent indigents "[f]rom the earliest times"). While these restraints on the freedom of speech and association would raise serious First Amendment concerns if imposed on private parties, there is no question that they can be imposed on lawyers.[13]

Petitioner relies on this Court's cases dealing with advertising by lawyers, arguing that those cases stand for the proposition that lawyers are held to no

---

then advised the court that those arguments were frivolous. *Id.* at 432. The state court directed counsel to submit, in accordance with state law, "a discussion of why the issue[s] lack[] merit," rather than just a statement that they do. *Id.* at 430, 432. This Court held that the requirement did not violate McCoy's Sixth Amendment right to counsel. The Court determined that the lawyer's ethical duty of candor to the court outweighed the client's interest in litigating his appeal. Although the case did not address the First Amendment, its message is clear: ethical obligations may require attorney speech in certain circumstances, and are not inconsistent with other constitutional guarantees, even where the attorney's speech disadvantages his client.

[13] The principle that justifies imposing special burdens on an attorney's speech because of the attorney's relationship to cases in which he serves as counsel is analogous to the burden on a public employee's freedom of speech. A public employee is not deprived of his right to speak on matters of public interest, but his free speech rights are qualified in a manner that would not apply to an ordinary citizen. See *Connick* v. *Myers*, 461 U.S. 138, 150-151 (1983); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-567 (1973); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

higher First Amendment standard than others. Pet. Br. 32-33. In fact, however, those cases stand for just the opposite proposition. From *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), to *Peel* v. *Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990), this Court has carefully considered the reasonableness of state bar regulations governing solicitations by attorneys. The Court has never suggested that lawyers are entitled to advertise in the same fashion as any other vendor, or even members of any other profession. Instead, in each case the Court has engaged in a balancing process, weighing the State's interest in the regulation of particular conduct against the lawyer's First Amendment interest in the kind of speech that is at issue. Unlike in First Amendment cases involving members of the general public, the interest in free expression by attorneys does not routinely trump the state's interest in regulating the legal profession. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, this Court upheld a ban on in-person solicitation by lawyers, and held that state interests in regulating lawyers "are particularly strong • • • [because] the State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.* at 460. Under the same reasoning, the state interest in regulating lawyers' extrajudicial comments about pending cases is very strong and should be found to outweigh the individual lawyer's interest in unrestricted free expression regarding those cases.

C. The First Amendment Does Not Require The State To Prove Actual Prejudice To An Ongoing Proceeding Before Restricting Attorney Speech

Petitioner's *amici* contend that the First Amendment requires the State to show actual prejudice to a judicial proceeding before an attorney may be disciplined for his extrajudicial comments. That contention is insubstantial. Courts have uniformly held that an attorney may be disciplined for his extrajudicial comments based on the likelihood of prejudice to pending judicial proceedings at the time the comments were made; no court has suggested that actual prejudice must be proved. See *In re Conduct of Lasswell*, 296 Or. 121, 126, 673 P.2d 855, 858 (1983) (the disciplinary rule "deals with purposes and prospective effects, not with completed harm").

If a showing of actual prejudice were required, even manifestly unethical attorney comments having every prospect of prejudicing pending proceedings could not serve as the basis for disciplinary action whenever it turned out—even for wholly fortuitous reasons—that the attorney's misconduct had no effect on the proceedings. For example, a defense attorney who made blatantly improper and prejudicial comments might be immune from punishment merely because the government, for reasons unrelated to the comments, decided to dismiss the charges, whether because the attorney's client subsequently chose to enter a guilty plea, or because the government ultimately obtained a conviction despite the prejudicial publicity engendered by the comments. That arrangement would put attorneys in a preferred First Amendment position compared to their clients, the press, and the general public, for the standard that governs those speakers does not require actual prejudice to be shown. Yet, as we have argued, the

status of lawyers in the legal system subjects them to more, not fewer, restrictions on their right to speak freely regarding cases in which they are serving as counsel.[14]

D. The Restrictions On An Attorney's Extrajudicial Public Comments Imposed By Nevada Supreme Court Rule 177 Are Reasonable

For the reasons set forth above, we submit that a State may limit an attorney's comments that pose a "reasonable likelihood" of prejudice to a pending judicial proceeding. It follows a *fortiori* that Nevada Supreme Court Rule 177 is constitutional, for it prohibits only those comments that create a "substantial likelihood" of prejudice—a higher standard than the Constitution requires.

Despite petitioner's protestations to the contrary, Rule 177 is not a categorical or prophylactic ban on speech, and it does not presume prejudice. Section 1 of the Rule—the only Section that states what the attorney "shall not" do—forbids the attorney from making extrajudicial, public comments that he knows

---

[14] It is no answer that in some instances the potentially prejudicial effect of attorney comments may be cured by a change of venue, by increased attention to jury selection, or by careful jury instructions. At best, those remedies are unhappy alternatives to avoiding the problem in the first place. They are not always successful, and it is not always possible to determine whether they have had the desired effect. Moreover, a change of venue or a greatly expanded jury selection process imposes significant costs on the justice system and may serve the tactical interests of one party. An attorney should not be permitted to impose costs on the system and, perhaps, obtain a tactical advantage by engaging in conduct designed to prejudice the trial, and then justify that conduct by claiming that there are devices that can be used to combat the potential prejudice that the attorney himself has sown.

or should know present a "substantial likelihood of materially prejudicing" the upcoming trial. By its nature, Section 1 requires a case-by-case determination of the possibility of prejudice. Section 2 advises the attorney that certain kinds of comments, such as statements of opinion regarding the credibility of potential witnesses or the guilt or innocence of the accused, are "ordinarily" likely to have a prejudicial effect. That Section, however, does not erect a "presumption" of prejudice, as petitioner claims. Statements of the sort listed in Section 2 are not forbidden as such; those statements are separately specified to provide guidance as to the kinds of statements that pose a particular risk of violating the prohibition in Section 1. Section 3 then provides assurance that certain kinds of statements are permissible even if they "ordinarily [are] likely" to materially prejudice an adjudicative proceeding or have a "substantial likelihood" of so doing. Rather than being rigid and categorical, the Rule endeavors to provide as much guidance as possible within a framework that necessarily requires a case-by-case analysis of the content and context of any challenged statement.

Like the Rule itself, its application by the Nevada Supreme Court was not categorical or conclusory. The court held that petitioner's statements were indeed "substantially likely to prejudice the proceedings." It found that "[t]he case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak." Pet. App. 4a. "[T]hese comments were timed to have maximum impact." *Ibid.* As applied, then, the Rule imposed no prophylactic ban on particular categories of speech; instead, the court carefully analyzed the nature and context of the statements at issue before finding that they violated the Rule.

Petitioner argues that his conduct was justified because it came in response to misconduct by the prosecution. A lawyer, however, is not entitled to exempt himself from ethical obligations merely because he thinks the prosecutor or the police made improper statements about a case. If petitioner believed that the prosecutor committed ethical violations, the proper course of action would have been to enlist bar disciplinary authorities to stop, and to sanction, the prosecutor's behavior.[15] If petitioner had held his press conference before there had been any adverse publicity concerning his client, the prosecutor certainly would not have been authorized to respond in kind.

In assessing the constitutionality of Rule 177, it is important to note that the Rule does not bar attorney speech altogether, but merely restricts that speech during the pretrial period. This Court has held that a State may regulate the timing or method of expression when the regulation is designed to further important state interests and is neutral with respect to viewpoint. In *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), for example, the Court upheld a prohibition on posting political campaign materials on telephone wires and poles on the

---

[15] As demonstrated by *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971), the Nevada Bar is not hesitant to discipline prosecutors for making prejudicial extrajudicial comments. There is no allegation, however, that the prosecutor in this case violated ethical guidelines; the information to which petitioner claims he was responding was released by the police.

ground that the city's interest in advancing aesthetic values was sufficient to justify the viewpoint-neutral rule. Likewise, in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court upheld as a valid "time, place, and manner" restriction a Park Service rule prohibiting sleeping on designated park lands, even though the respondents wished to engage in political protest by sleeping on the designated property.

Like the regulations at issue in those cases, Rule 177 is justified by the State's vital interest in maintaining the integrity of the trial process and by the lawyer's pivotal role in that process. The Rule is not intended to censor or suppress ideas or information of which the State disapproves. It applies equally to all lawyers involved in a case, and it does not single out certain categories of favored or disfavored speech.

Moreover, Rule 177 is narrowly tailored to the purposes it serves; it merely postpones potentially prejudicial comments until after the risk of prejudice has passed. See *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986) (a law that regulates only adult theaters, and not others, is "narrowly tailored" to combat a problem associated solely with those theaters). In general, that period is a short one. In the federal system, the Speedy Trial Act of 1974, 18 U.S.C. 3161(c)(1), requires trial to begin within 70 days of the indictment, and 95 percent of criminal trials begin by that deadline. Administrative Office of the United States Courts, *Report of the Proceedings of the Judicial Conference of the United States* 18 (1988). In state courts, the median time from indictment to sentencing in felony cases is 86 days. J. Goerdt, *Examining Court Delay* 54-55 (1989).

Even during the pretrial period, a lawyer may make any statements that are not proscribed by the Rule. Once trial begins, the lawyer may make opening and closing statements, cross-examine witnesses, and argue motions, all within the hearing of the press, and all of which reveal information. Once the case is over, the lawyer is free to discuss any aspect of the case with whomever he pleases; he is thus free to "translate the work of our courts for an interested public." Pet. Br. 36. Furthermore, the client himself may at any time speak to the press, or may engage a (non-lawyer) spokesman to do so on his behalf. In sum, Rule 177 is reasonable because it is a carefully tailored restriction that seeks to protect the judicial process without restricting the attorney's right to speak where that speech would not pose a serious risk to the integrity of court proceedings.

II. NEVADA SUPREME COURT RULE 177 IS NEITHER VAGUE NOR OVERBROAD

A. The Rule Is Not Vague

A statute or rule may be void for vagueness if it fails to give "fair notice to those to whom [it] is directed." *Grayned* v. *City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)). Statutes and rules must be capable of being understood and applied by "the ordinary person exercising ordinary common sense." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

Petitioner argues that Rule 177 is vague in two respects. First, he contends that Section 2(d), under which it is ordinarily improper for an attorney to offer the press an "opinion as to the guilt or innocence

of a defendant," is contradicted by Section 3(a), which permits attorneys to state "without elaboration * * * the general nature of the claim or defense." Pet. Br. 46. Even if it had merit, however, this claim would not help petitioner, since the Nevada Supreme Court found his comment to fall within Section 2(a) of the Rule, which covers comments on the credibility of witnesses, rather than on the basis of Section 2(d). In any event, an attorney can state the general nature of his client's defense without extolling its merits, arguing the weaknesses of the government's case, and questioning the good faith of the government in bringing it. Nothing in the Rule bars an attorney from stating that his client denies the charges and intends to contest them, which is quite different from vouching for his client's innocence.

Second, petitioner claims that Section 2(a) of the Rule, which states that it is ordinarily improper for an attorney to comment to the press on the credibility of a witness, is inconsistent with Section 3, which permits unelaborated statements on "the general nature of the claim or defense," "information contained in a public record," and "the general scope of [an] investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved." The short answer is that nothing in Section 3(c) can reasonably be construed as authorizing comment on the credibility of witnesses. To be sure, an unelaborated statement of the defense might imply that the government's evidence should not be credited. But that is a far cry from directly attacking the credibility of individual witnesses, which is what the Rule prohibits and what petitioner was found to have done.

Rather than suffering from vagueness, Rule 177 achieves a remarkable level of precision in addressing

an inherently difficult definitional task. The drafters of the Rule made every effort to provide guidance to attorneys not only by stating a rule in Section 1, but also by setting forth the specific categories of statements that would be likely to be sanctionable (in Section 2) and those that may safely be made (in Section 3). Rule 177 did not leave petitioner in doubt as to whether the statements he intended to make at his press conference would violate his ethical obligations. But petitioner went ahead with his remarkable press conference, apparently disregarding the risk that he would be sanctioned as a result.

B. The Rule Is Not Overbroad

Overbreadth doctrine "is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of * * * sanctions by a statute susceptible of application to protected expression.'" *New York* v. *Ferber*, 458 U.S. 747, 768 (1982) (quoting *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)). This Court has warned that the doctrine "must be carefully tied to the circumstances in which facial invalidating of a statute is truly warranted," *Ferber*, 458 U.S. at 769, for "[a]pplication of the overbreadth doctrine is * * * strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). As such, "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770; *Parker* v. *Levy*, 417 U.S. 733, 760 (1974).

Petitioner and his amici argue that Rule 177 is overbroad because it applies to civil litigation and

might cover, for example, a public interest lawyer's statement about the nature of a case. That is clearly wrong. The Rule states that a lawyer may discuss "the general nature of the claim," as well as "the information contained in the public record." Thus, a lawyer may discuss the allegations, both factual and legal, of his complaint. Petitioner also argues that the Rule "presumptively prohibit[s]" certain categories of speech and that the Rule is overbroad as a result. Pet. Br. 48. As we note above, however, Rule 177 simply does not ban any category of speech. See pp. 21-22, *supra*.[16]

[16] That Rule 177 applies to both jury trials and bench trials does not render it overbroad, since for any statement to be sanctionable it must be substantially likely to prejudice the proceeding. Obviously, it will be much harder to prejudice a bench trial than a jury trial, but that does not mean that statements outrageous enough to prejudice even the hardiest judge should be protected.

Petitioner's argument that Nevada Supreme Court Rule 177 applies to non-practicing lawyers, such as attorney-journalists, is mistaken. Rule 177 is identical to ABA Model Rule 3.6, which the Nevada Supreme Court adopted at the same time that it adopted the rest of the ABA Model Rules of Professional Conduct. Within the ABA Model Rules, Rule 3.6 is located in the section entitled "Advocate," which contains those rules regulating the lawyer's conduct in that role. The comment to Rule 3.6, see Nevada Supreme Court Rule 150 (comments to ABA Model Rules guide interpretation of the Nevada Rules), indicates that it is based upon the ABA Model Code, whose Disciplinary Rule 7-107 was "limited in its application to those attorneys participating in the case." American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press at 93 (1968). The predecessor to DR 7-107, ABA Canon 20, was likewise interpreted by its drafters to apply only where the speaker is counsel in a case. See H. Drinker, *supra*, at 296.

[Continued]

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

JOEL R. MARCUS
Attorney

MARCH 1991

[16] [Continued]

Finally, Rule 177 does not forbid a lawyer's prejudicial comments on pending litigation when made "without intent to prejudice the fairness of trials." Pet. 49. The Rule's only prohibition is contained in Section 1, and that Section forbids comments only if the lawyer "knows or reasonably should know" that they are substantially likely to prejudice the fairness of a trial.

U. S. GOVERNMENT PRINTING OFFICE, 1991 282081 20490